IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 26TH OCTOBER 2006 / 4TH KARTHIKA 1928

MFA.No. 1322 of 1999()

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(IC.48/1996 OF EMPLOYEES' INSURANCE COURT, ALAPPUZHA)

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APPELLANT/IST OPP. PARTY:

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THE REGIONAL DIRECTOR,
E S I CORPORATOIN, THRISSUR.

BY ADV. SMT.T.D.RAJALAKSHMI

RESPONDENTS/APPLICANT AND 2ND OPP. PARTY:

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1. V K RAJESWARI, INS. NO.54.001988,
   KOZHIPURATH HOUSE, THATHAMPILLY,
   NORTH PARAVOOR.

2. THE MANAGER (IR),
   KATHAYEE COTTON MILLS LTD.,
   PERUMBAVOOR ROAD, ALUVA 683101.

R1 BY ADV. SRI.A.JAYASANKAR

THIS MISC. FIRST APPEAL HAVING COME UP FOR ADMISSION ON 18/08/2006, THE COURT ON 26/10/2006 DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN, J.**

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M.F.A.No.1322 of 1999

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Dated this the 26th day of October, 2006.

**JUDGMENT**

This is an appeal by the Employees' State Insurance Corporation filed challenging the judgment dated 14-6-1999 in I.C.No.48/1996 of the Employees' Insurance Court, Alappuzha. It relates to the claim by the first respondent, who is an injured employee. She sustained injuries while working under the second respondent. The Medical Board examined her and awarded 30% disablement benefit. She filed I.C.A.No.10/1992 before the Employees' Insurance Court. After recording evidence, the Court modified the disability as 50%. That decision was challenged by the injured employee before this Court in M.F.A.No.447/1995. That appeal was dismissed by the judgment dated 26th July, 2001.

2. During the pendency of the aforesaid appeal before this Court, on account of the employment injury and the consequential disability, the injured employee

became irregular in attending to the work of the establishment and on account of such disability followed by the inability to work, she was issued a notice by the employer to which she answered that she was under prolonged ESI leave. It was noticed that she worked only three days in the year 1994. She was accordingly discharged by the employer. After discharge from service, she approached the ESI Corporation with a request to extend her full rate of benefit in view of the loss of her employment. That plea was rejected by the Corporation by taking the stand that even the granting of 50% disablement benefit was then pending before this Court, though at the instance of the injured employee.

3. The injured employee moved the Employees' Insurance Court by filing I.C.48/1996 from which this appeal arises, seeking relief praying that she is entitled to 100% disablement benefit. This was contested. The employee was examined through Commission since she was unable to go to the Employees' Insurance Court which was functioning in the

third floor of a building, as recorded in paragraph 5 of the impugned judgment.

4. After taking note of the evidence on record, the Employees' Insurance Court held that the employee is entitled to 100% disablement benefit. To hold so, the Employees' Insurance Court noticed that Section 73 of the Employees' State Insurance Act imposes a bar on the employer from dismissing, discharging or otherwise punishing an employee during the period in which he is in receipt of disablement benefit for temporary disablement or is under medical treatment for sickness or is absent from work as a result of illness duly certified in accordance with the regulations. The Court came to the conclusion that the appellant was not in receipt of any sickness benefit and her absenting from work was not on account of any illness duly certified in accordance with the regulations. Therefore, the bar under Section 73 was found to be not applicable. However, the Court came to the conclusion that if an employee is found to be incapable of discharging the normal duties to be performed, there

will be no other way out for an employer but to dispense with the service of an employee. The Court held that under such circumstances, the moot question to be answered was whether the liability would shift to the Corporation. In answering the said issue, the Court adverted to the facts of the case and found that the employer is convinced of the inability of the injured employee to perform duties and this culminated in Ext.P1 notice. The said situation was after the discharge of the injured employee was determined at 50% by the Court. Under such circumstances, the Employees' Insurance Court came to the finding on facts that it would only be proper to extend the 100% disablement benefit.

5. In holding so, the Employees' Insurance Court also apparently equated the case of the petitioner to similar other workers in different establishments.

6. From what is stated above, it is quite evident that no substantial question of law arises for decision in this case on the matter decided by the Employees'

Insurance Court, since the impugned judgment essentially revolves on a finding of fact.

7. The learned counsel for the ESI Corporation, however, urged that since M.F.A.447/1995 has been filed, considered and decided, the claim of the injured employee should be treated as having merged finally in the aforesaid decision of this Court in the aforesaid Appeal and that, therefore, in law, the Employees' Insurance Court could not have decided the case in favour of the injured employee. Even if I were to treat that this is a substantial question of law arising for decision in this appeal, the same can only be answered in favour of the injured employee. This is so because, the right of the injured employee, which was subject matter of M.F.A.447/1995, was the determination by the Employees' Insurance Court as regards the percentage of disability referable to the accident and the injuries caused to her by reason thereof. The continued inability of the injured employee to discharge the duties and responsibilities attached to the post which she occupied as an employee

is, though a remote result of the injuries suffered by the injured employee, not directly connected to the cause of action on the basis of which the M.F.A. and the I.C.A. from which the said appeal arose to this Court were decided. The cause of action on the basis of which the present litigation has been made is different from the cause of action that led to the decision of this Court in M.F.A.447/1995. This view is also fortified by the Bench decision of this Court in M.F.A.No.7/1999 decided on 8-9-2005.

In the result, the appeal fails. The same is dismissed. No costs.

**THOTTATHIL B. RADHAKRISHNAN,**
**JUDGE.**

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**THOTTATHIL B. RADHAKRISHNAN, J.**

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M.F.A.1322 of 1999

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**JUDGMENT**

**Dated: 26th October, 2006.**